NO. 48278-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KENNETH FLYTE, as Personal Representative of THE ESTATE OF KATHRYN FLYTE, on behalf of their son JACOB FLYTE, and as personal representative of THE ESTATE OF ABBIGAIL FLYTE,

Respondents & Cross-Appellants,

v.

SUMMIT VIEW CLINIC, a Washington corporation,

Appellant and Cross-Respondent.

RESPONDENT & CROSS-APPELLANT'S OPENING BRIEF

Lincoln C. Beauregard, WSBA No. 32878
Julie A. Kays, WSBA No. 30385
Connelly Law Offices, PLLC
2301 North 30th Street
Tacoma, WA 98403
(253) 593-5100

Ashton K. Dennis, WSBA No. 44015
Washington Law Center
15 Oregon Avenue, Suite 210
Tacoma, Washington 98409
(253) 476-2653
Attorney for Appellants

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I. INTRODUCTION

Appellants, the Flyte family, submit this memorandum as their opening brief as to these appellate proceedings. This is a wrongful death case involving the loss of a pregnant mother to the Swine Flu. This second appeal (this matter up after a re-trial) arises in relation to a well settled principle of Washington law as codified under RCW 4.22.070 in relation to principles of comparative fault. At the trial court level, the lawyers for Summit View Clinic engaged in CR 11 worthy misrepresentations of the controlling and interpretative case law in an attempt to win a battle, but to then ultimately lose the war. Specifically, the Clinic's lawyers represented to the trial court that appellate precedent suggested a legal defense was available to them in the form of the automatic deduction ("offset") of a settlement by a non-party (and otherwise co-defendant) from any judgment entered in this lawsuit. What's more is that the Clinic's lawyers represented to the trial court the law supported the arbitrary "*choice*" to invoke this "*offset*" the week of trial if, in the eyes of the Clinic's lawyers, the settling party had already paid "*too much*" thereby making it purportedly advantageous to take the "*offset*" in lieu of proving, with admissible evidence, an empty chair defense under RCW 4.22.070. Judge Ronald Culpepper presided

masterfully over this complex medical malpractice trial but was, at the same time, fooled into ruling in favor of the Clinic on this discrete legal issue. By the end of these proceedings, it became clear that Judge Culpepper recognized the Clinic had not been forthcoming with the associated legal representations noting the error, as alleged by the Flyte family, to be an "*easily fixed*" on appeal: "*THE COURT: And if I can just observe, assuming I made an erroneous ruling, if we grant an offset, which is what I said would happen, that's something that can be very easily fixed by the Court of Appeals; they just say add it back on, very simple.*"[1]

This particular appeal boils down to the simple read and review of existing case law and determining which party is being honest about the legal representations at issue. As will be proven through this appellate process, the Clinic's lawyer have violated the duty of candor to the trial court and previously lied about (and also omitted) the state of existing precedent. The Clinic purposefully invited error into these proceedings and should not benefit from such conduct. Moreover, the Clinic's plea for a new trial has no merit. The Clinic lost the case premised upon the merits and repeated contradictory and untrue representations that were made before the jury. Based upon these legal misadventures, this matter should

[1] VRP of November 6, 2015, Page 3-4

be remanded for a proper entry of judgment in the amount which the jury rendered a very just verdict: $16,700,000.00.

II. STATEMENT OF THE CASE

This Court is already aware of the generalized facts giving rise to this lawsuit extending from the precedent published as *Flyte v. Summit View Clinic*, 183 Wash. App. 559, 333 P.3d 566 (2014). In the prior appeal, this Court granted a new trial based upon the erroneous admission of "evidence", that being a prior $3.5 million settlement with a non-party to this lawsuit, specifically St. Joe's Hospital. *Id.* The matter was remanded for a re-trial commencing on October 7, 2015. Prior to trial, the parties participated in pre-trial motions and preparatory conferences.

In the lead up to the second trial, the defense lawyers representing the Summit View Clinic, Elizabeth Leedom and Jennifer Crisera, filed a brief arguing that, under case law that included specifically *Diaz v. State*, 175 Wn.2d 457, 285 P.3d 873 (2012) and *Adcox v. Children's Orthopedic Hospital*, 123 Wash. 2d 15, 864 P.2d 921 (1993), the Summit View Clinic was entitled to take an "offset" of the $3.5 settlement with a non-party, St. Joe's Hospital, against any judgment in this lawsuit.[2] Ms. Leedom and Ms. Crisera argued these cases represent the notion the Clinic could simply "choose" (at some unspecified threshold before the trial began) the

[2] VRP of October 2, 2015, Pages 20-31

best alternative between allocating fault under RCW 4.22.070 or just taking an automatic $3.5 judgment "offset" from any judgment.[3] Ms. Leedom indicated an opinion that St. Joe's had paid "*too much*" so the Clinic was going to simply now "*choose*" of the offset instead of an allocation defense:

> THE COURT: So why not choose allocation and prove that St. Joe's was negligent?
>
> MS. LEEDOM: I think, quite honestly, Your Honor, that St. Joe's paid way too much money in this case and I would rather have the offset. It's our position that it's my choice to get to choose offset or allocation; I don't get to do both.
>
> THE COURT: And your position is it's allocation, period.
>
> MR. BEAUREGARD: That's our position. And there's no source of law that you can find that supports this idea of some magical reduction in offset. There's no source of law to say it in Washington state.
>
> THE COURT: Well, again, let me read Diaz and Adcox a little more carefully. I read Diaz. I don't think I read Adcox, but I was looking at Diaz for other reasons. And I will let you know Monday through Angie.[4]

The parties proceeded to trial. The Clinic never offered *any* evidence during the trial that any other non-party was at fault for the Flyte family's injuries pursuant to RCW 4.22.070. Nor did the Clinic offer an instruction on allocation of fault to a non-party. During trial, undersigned

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[3] VRP of October 2, 2015, Pages 20-31

[4] *Id.*

counsel continued to accuse the Clinic's lawyers of CR 11 worthy misrepresentations regarding the "offset" issue. The trial court documented that: "*This was vigorously opposed by plaintiff before, during, and after the trial verdicts.*"[5] At the close of the defense's case in chief, undersigned counsel noted the non-party $3.5 million settlement included claims of the Estate of Abbigail Flyte – a claim that had been expressly dismissed in this lawsuit.[6] Judge Culpepper ruled the $3.5 million offset would need to be adjusted to take this into account.[7]

The parties engage in heated briefing and argument concerning the entry of judgment and the offset issue.[8] The Flyte family submitted a legal desk-book before Judge Culpepper authored by Ms. Leedom's law firm demonstrating the offset issue was a legal fiction in this context.[9] After losing badly before the jury, the Clinic's lawyers softened their position (evidently hoping to use their own legal mis-representations as the basis for a new trial via invited error) but did still maintained Washington provided law for an "offset" in this context.[10] Ms. Leedom managed to find a trial court order from a King County Superior Court in

[5] CP 405-7

[6] CP 405-7

[7] *Id.*

[8] CP 219-232, 246-59, & 309-15

[9] CP 301-8

[10] CP 246-59

an un-related proceeding seemingly to support the idea of an "offset" under other circumstances.[11] The Clinic's lawyers did not include the associated briefing in such a way to provide context for that other trial court's ruling.[12] Ms. Leedom highlighted during oral argument that at least some other trial court judge may have ruled similarly, so the CR 11 allegations were not justified.[13]

Judge Culpepper took the parties' arguments under advisement and indicated he would go back in chambers and decide how to calculate the judgment allocation.[14] The undersigned counsel argued the Clinic had continued to perpetrate a fraud upon the Court and that conducting a mini-trial on "offset" with no law or factual basis violated the United States Constitution, amongst other laws.[15] Left with no alternative, Judge Culpepper took the matter under advisement in chambers.[16] It should be noted the Clinic never even submitted documentation of the $3.5 million

[11] CP 260-300

[12] *Id.*

[13] VRP of November 6, 2015

[14] CP 405-7

[15] *Id.*

[16] *Id.*

settlement as an exhibit.[17] Documentation of the $3.5 million settlement appears no place within the appellate record.[18]

After holding some sort of clandestine evaluative process in chambers, Judge Culpepper *sua sponte* informed the parties in a written ruling that he was going to adjust the $3.5 million settlement by $150,000 to account for the claims of the Estate of Abbigail Flyte, ruling:

> *The Settlement Agreement and Release, which has a confidentiality clause, has been provided to me but does not provide much detail about the assessment of the relative values of the various claims. According to the report of the settlement guardian ad litem, the settlement was divided approximately two-thirds to Mr. Flyte and one-third to Jacob. Mr. Flyte represented himself individually with claims for the wrongful death of Mrs. Flyte and Abbigail and the claims of their estates but there is no allocation of those claims in the two-thirds of the settlement to be received by Mr. Flyte. It is very difficult for me to know all the factors that went into the settlement agreement but it appears to me that the claim for wrongful death of Abbigail was not as strong as the claim for the wrongful death of Mrs. Flyte and would have been much more difficult to prove. Abbigail appears to have made satisfactory progress in her development after her birth, although apparently there was some concern she was at risk of developing cerebral palsy. The claim for her wrongful death was not pursued by the plaintiff during the second trial which could indicate the plaintiff thought this was a difficult claim to prove. Although it is impossible to know all that went into the settlement agreement, it appears to the undersigned that the claim for Abbigail's wrongful*

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[17] *Id.*

[18] CP 260-300

> *death was a minor part of the total settlement and probably had a settlement value of no more than $150,000..*[19]

Judge Culpepper decided to deduct some of that money from each of the independent remaining claims of Jacob Flyte, Kenny Flyte, and the Estate of Kathryn Flyte.[20] Ultimately, on November 13, 2015, a judgment was entered consistent with Judge Culpepper's calculations for the cumulative total of $13,350,000.00.[21]

On the merits, the Clinic did not lose the trial based upon any sort of unfairness or misconduct. By contrast, the Clinic's substantive defense was terrible and insulted the intelligence of the jury. The Flyte family was able to elicit ample evidence to support the claim of failure to give informed consent and the proximate cause thereof to the death of Mrs. Flyte. What is missed by the Clinic is not only did the Flyte family prove the failure to provide informed consent but provided "why" there was a failure. The jury learned from the Clinic's own staff why Dr. Marsh failed to (or was unable to) obtain informed consent. He failed to obtain informed consent because the information required to provide such consent was not disseminated, read, or cared about by Summit View Clinic. This was undisputed at trial.

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[19] CP 405-7

[20] *Id.*

[21] CP 408-10

Defense counsel completely undermined their own credibility on multiple occasions. As examples, in opening statements, the Clinic's lawyers claimed that their employees had safety meetings related to the H1N1 pandemic.[22] At trial, a key witness, Ms. Brady never remembered attending a single meeting and was never given any H1N1.[23] During opening statement, counsel for the Clinic indicated staff did not have to read health advisories even though those same health advisories indicated to "disseminate to all staff".[24] During testimony, the head nurse testified

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[22] CP 599 – 600.

[23]Testimony of Andrea Brady, CP 730-31: "Q And yesterday Ms. McClellan testified. I'm going to represent to you that she doesn't recall a specific meeting about H1N1 at Summit View. Do you recall any specific meeting about H1N1?

A No.

Q So that means, it's fair to say, that you have no recollection of Ms. McClellan advising you of the risk H1N1 poses to pregnant women; is that correct?

A Correct.

Q You would also agree, you've given testimony before, that the CEO and your boss, Dr. William Marsh, he didn't give you any specific information on H1N1 as of June 26th, 2009, correct?

A Correct.

* * *

[24] Opening statement, CP 480 "Now, a medical assistant [Andrea Brady] is not a nurse, but they're trained to do that initial start with the patient, take the information from the patient and understand what's going on. You know, it was mentioned that she admitted that she had not read those health alerts. She didn't. She's a medical assistant."

Contradicted by Head Nurse Marge McCleanen CP 610-11: Q And also to be clear, you do not agree that it was appropriate for Ms. Andrea Brady to not even read the health alerts? You don't agree with Mr. Cahill on that, do you?

A Hopefully, she would have read them, yes.

Q That was your expectation?

A Yes.

that staff was expected to review health advisories.[25] The Clinic's administrator certified interrogatory responses indicating that the Clinic never received health advisories.[26] The Flyte family was able to prove through fax confirmation sheets the Clinic was faxed many health advisories over a period of months.[27] The head nurse testified on direct

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* * *

[25] *Id.* 732: Q (By Mr. Dennis) Every single day -- well, strike that. Throughout your career you've read these health advisories?

A No.

Q In your 15 years as a medical assistant both at Summit View Clinic and at now Woodcreek, you've never read a health advisory?

A No.

Q So if there was specific health advisories distributed to you at Summit View Clinic about H1N1 before June 26th, 2009, it's fair to say that you never read

them; is that right?

A Correct.

* * *

Contradicted by Head Nurse Margaret J. McLellan, CP 596 "Q Did you expect your nursing staff to be aware of that information in the health advisories?

A Yes.

* * *

Further, CP 597: Q Are you aware that Mr. Cahill, the lawyer for the clinic, told this jury in opening statement that medical assistants, Andrea Brady specifically, she didn't need to read them? Are you aware of that?

A No.

Q Would you agree with that statement, that your medical assistants under your charge did not need to be familiar with the health advisories?

A No, they needed to be aware.

[26] CP 564-68.

[27] *Id.*

she had a list of safety meetings.[28] During rebuttal testimony, the same nurse indicated she never tried to find them as she had been "*too busy*."[29] That same nurse observed large portions of the trial. The Clinic's staff represented to the jury it was normal for doctors to see only 20-25 patients a day, but no more.[30] The evidence established that Dr. Marsh had 30 of the 35 slots filled on his scheduling sheet the day Mrs. Flyte visited the Clinic.[31] The Clinic called an expert witness, Dr. Ruiz, to opine that H1N1 did not present without a fever until months after the first recognition of the disease. At trial, contemporaneous news articles from the New York Times confirmed that the earliest cases from Mexico were presenting without fevers.[32] The Clinic's primary expert, Dr. Ruiz, claimed not to recall having been sued on multiple occasions for committing medical malpractice in the past.[33] After a lunch break and time to confer with Ms. Leedom and Ms. Crisera, Dr. Ruiz recalled two lawsuits including one wherein a verdict was entered against him.[34] Dr. Marsh claimed to be familiar with Katy Flyte, but could not recall her age

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[28] CP 622-26; 1905-06.

[29] CP 1905-06.

[30] CP 557-58; 561.

[31] CP 560-561.

[32] VRP of October 26, 2015, Pages 1910-11

[33] VRP of October 19, 2015, Pages 1360-1423; 1433

[34] *Id.*

testifying that she was actually ten years older then she really was.[35] This list is not exhaustive. The Clinic lost the trial because the evidence of fault was strong, the damages tremendous, and the defense that was presented, brazenly dishonest.

III. ASSIGNMENTS OF ERROR

Assignment of Error 1: The trial court erred in ruling that the Clinic was permitted to choose between the defenses of an offset versus allocation.

Issue 1: Should this Court reverse the trial court's ruling and interpretation of the applicable law and require entry of judgment for the full amount of the verdict?

Assignment of Error 2: The trial court erred in adjusting the amount of the verdict without conducting a proper reasonableness hearing and/or affording proper due process under the law.

Issue 2: Should this Court reverse the trial court's adjustment of the judgment calculation?

IV. ARGUMENT RE: THERE IS NO "OFFSET" UNDER WASHINGTON LAW BASED UPON THESE CIRCUMSTANCES

The Clinic claims it is entitled to an "offset" of the $3.5 million settlement. That proposition is not true. The Washington Supreme Court

[35] VRP of October 20, 2015, Pages 1475-1527

has expressly ruled the offset principle is inconsistent with the Legislative dictates under RCW Chapter 4.22. In 1992, the Supreme Court took on this precise issue in *Washburn*: "Defendant Beatt is entitled to no credit or offset for any amounts paid by any settling entities, whether fault-free or at-fault, because none of those entities are jointly and severally liable defendants within the meaning of the express language of RCW 4.22.070. RCW 4.22.070(2) does not apply, and thus does not direct that RCW 4.22.040, .050, or .060 is to be applied." *Washburn v. Beatt Equipment Co.*, 120 Wash. 2d 246, 840 P.2d 860 (1992).

In truth, since the enactment of the Tort Reform Act of 1986, the "offset" of verdicts has not been the law of Washington: "Where proportionate liability applies, as here, a defendant can never be liable for more than his percentage share, because recovery is limited to his proportionate share of the total damages. The reasons for allowing credits where the liability is joint and several are not present where liability is proportionate...The trial court judgment is reversed, and the case is remanded to the trial court with instructions to enter judgment for the plaintiff for the full amount of the verdict against Northwest Propane." *Waite v. Morisette*, 68 Wash. App. 521, 843 P.2d 1121 (1993). This law is widely understood by practitioners in the State of Washington as documented since 1986 in the local law reviews. *See* Harris,

Washington's 1986 Tort Reform Act: Partial Tort Settlements After the Demise of Joint & Several Liability, 22 Gon.L.Rev. 67, 76 (1986–87).

The case law cited before Judge Culpepper by the Summit View Clinic, namely *Adcox*, actually followed *Washburn*: "the Hospital is correct that former RCW 4.22.070(1) mandates allocation as the appropriate method of apportioning responsibility for the plaintiff's award..." *Id.* at 25. As noted in the Flyte family's underlying pre-trial briefing regarding the apportionment of fault under WPI 41.04, the Summit View Clinic had to prove comparative of fault of other settling non-parties in order to have the verdict reduced by any amount.[36] This is the crystal clear law of Washington State. In accord with *Washburn*, *Adcox*, and *Waite*, this matter should be remanded with instructions to the trial court to enter judgment for the full $16,700,000.00 and the Clinic should certainly not benefit from this invited legal error

V. ARGUMENT RE: THERE WAS NO DUE PROCESS AND/OR REASONABLENESS HEARING IN RELATION TO THE OFFSET

Under Const. Art. I § 21 and RCWA § 4.76.030, there is strong presumption that verdict is adequate, and a trial court cannot, after fair trial, substitute its conclusions for that of jury on conflicting evidence as to amount of damage; jury is final arbiter of evidence, being limited only in

[36] CP 83-98 & CP 105-6

that its verdict must be supported by substantial evidence. *Cox v. Charles Wright Academy, Inc.,* 70 Wash.2d 173, 422 P.2d 515 (1967). In this regard, there was no due process in relation to the offset issue -- not even a properly conducted reasonableness hearing. Prior to applying any offset, even when appropriate, the matter must be reviewed and deemed reasonable after a properly conducted reasonableness hearing. *See* RCW 4.22.060. A party must provide at least five (5) days notice before a reasonableness hearing. *See* RCW 4.22.060(1). Even if considered a "reasonableness hearing" insufficient notice was given by the Clinic. If a proper reasonableness hearing was to be conducted, St. Joe's Hospital was required to have been notice and an opportunity to participate. *Id.*

There never was a real reasonableness hearing. The Clinic first suggested Judge Culpepper conduct a reasonableness hearing in response to the motion to enter judgment.[37] The Clinic's motion for a reasonableness hearing was not timely under Pierce County Local Rule 7, and the motion was not properly noted and did not take place.[38] The Flyte family never had an opportunity to argue the issues or factors.[39] Moreover, the Clinic never submitted a copy of the settlement agreement

[37] CP 246-59

[38] *Id.*

[39] *Id.*

between the Flyte family and St. Joe's Hospital, so there is no record to support the offset on appeal. A party seeking appellate review has the burden of providing this court with the evidence in the record relevant to the issues before us. RAP 9.2(b); *Story v. Shelter Bay Co.,* 52 Wn. App. 334, 345, 760 P.2d 368 (1988), and the Clinic failed to provide this Court an adequate record. The undersigned called this error to the Clinic's attention during oral arguments post-trial:

> THE COURT: Well, how much of the settlement was for the wrongful death claim of Abbigail, loss of parent-child consortium, et cetera?
>
> MS. LEEDOM: I do not know the answer. That was settled before the suit.
>
> THE COURT: Maybe Mr. Beauregard can tell me.
>
> MR. BEAUREGARD: I can't, Your Honor. First of all, I haven't revisited the material and they actually haven't put it in the record, so they are just kind of telling the Court what they think it says and it's not in the record. You didn't file it (gesturing towards Ms. Leedom), so there's no record to make on this now.
>
> THE COURT: I got a copy of – I saw a copy of the settlement agreement, I think – I can't remember exactly when during the trial...[40]
>
> MS. LEEDOM: We referenced the guardianship proceedings that are of record in the Pierce County Superior Court.
>
> THE COURT: And I looked at the guardian report. I think he says two-thirds, on third.

[40] VRP of November 6, 2015, Pages 19-20

> MR. BEAUREGARD: I'm not sure. I haven't looked at it and they didn't make a record. It could be accurate, but they didn't actually file anything and there's certainly no quantification for Abbigail's claim. I can't really respond to this because this is a legal fabrication. There's no law that gives us guidance.
>
> THE COURT: I understand you think it's a legal fabrication. I got that. You made that point well a number of times. But right now my question is, I'm going to apply an offset over your objection; however, the offset wouldn't apply for the claims of Abbigail. I don't know how we do that, frankly. The report of the settlement guardian ad litem at least say's it's kind of two-thirds, one, third.[41]
>
> * * *
>
> THE COURT: Well, I didn't have a copy of his because I think when we were here before it that there was a confidentiality and I didn't want to file it, and I haven't filed this, and I don't really want to file this either.
>
> MR. BEAUREGARD: Well, we have to make a record for appeal, and it's their appeal on that issue, so there's nothing for the court to look at on appeal.[42]

The Clinic's lawyers never corrected this error that was called directly to Ms. Leedom's attention at the hearing. However, the Flyte family did submit an excerpt of the confidentiality provision in in the body of the motion for entry of judgment.[43]

The settlement agreement with St. Joe's Hospital included other intangible conditions, such as confidentiality provisions and annuity

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[41] VRP of November 6, 2016, Pages 20-21

[42] *Id* at Pages 25-26

[43] CP 219-32

payments over time that must be assigned quantitative value if any offset is to be properly calculated. This Court cannot review the settlement agreement, because the defense never submitted a copy. In this regard, the trial court erred by conducting a hearing, *sua sponte*, as to the settlement with St. Joe's Hospital.

VI. THE JURY WAS NOT EXPOSED TO ANY EXTRINSIC EVIDENCE AND THE CLINIC'S REPRESENTATIONS THAT ANY SUCH ARGUMENT OR EVIDENCE WAS INTRODUCED CONTRARY TO ANY TRIAL COURT RULINGS IS ANOTHER FABRICATION THE CLINIC'S ALLEGATIONS OF MISCONDUCT BY COUNSEL ARE WITHOUT ANY MERIT

The appellate courts review a trial court's order denying a new trial solely for abuse of discretion when it is not based on an error of law. *Detrick v. Garretson Packing Company,* 73 Wash.2d at 812, 440 P.2d 834. In this case, the Clinic identified no legal errors in relation to the arguments and evidence, so this appellate court should defer to Judge Culpepper as to these rulings. A trial court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Littlefield,* 133 Wash.2d at 46–47, 940 P.2d 1362. A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices. *Id.* In this instance, all of Judge Culpepper's rulings raised by the Clinic were legally correct and none of

the arguments raised by the Clinic should be well taken. The Clinic (and the Flyte family) received a fair trial and Judge Culpepper did not abuse his discretion when he denied the motion for a new trial.

On re-trial, the Flyte family's substantive case was based upon the failure to provide proper informed consent about H1N1 and the health advisories that had been disseminated by the Health Departments in relation to the ongoing pandemic which would have provided Dr. Marsh with the information needed to give such consent. From the outset, the Clinic's representations about the arguments and evidence being admitted over "sustained" objections are again, fabrications. None of the arguments or evidence violated any motion *in limine* and/or was introduced over any "sustained" objection. Those representations are not honest and are not borne out by any of the Clinic's citations to the record. At most, on a couple of occasions, Judge Culpepper encouraged the parties to ensure that their focus was upon the operative claims. No Court rulings were ever violated.

There was no prejudicial misconduct by counsel and a new trial is not warranted. As a general rule, the movant must establish that the conduct complained of constitutes misconduct (and not mere aggressive advocacy) and that the misconduct is prejudicial in the context of the entire record. 12 JAMES WM. MOORE, FEDERAL PRACTICE §

59.13[2][c][I][A], *at 59–48 to 58–49 (3d ed.1999); *Aluminum Co. of America v. Aetna Cas. & Sur. Co.*, 140 Wash.2d 517, 998 P.2d 856 (2000). The movant must ordinarily have properly objected to the misconduct at trial and the misconduct must not have been cured by court instructions. *Id.* As in the case law relied upon by the Clinic, as threshold issues is to evaluate if "the conduct complained of is misconduct" at all.[44] In this case, the Clinic improperly attempts to construe the admission of proper evidence (meaning evidence that hurt the Clinic in the merits) as "misconduct" of counsel. In so arguing, the Clinic ignores the reality that the law does not support that an act of counsel as constituting the trial court overruling defense counsel's objection and the simple admission of damaging probative evidence. In this instance, the Clinic failed to identify a single credible deviation from any evidentiary ruling of this Court, and the Clinic also failed to identify any evidence whatsoever that the jury came to view and the Court did not admit into the case.[45] The Clinic also failed to describe how Judge Culpepper abused his discretion. Instead, the Clinic attempts to re-litigate the substantive trial.

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[44] *Teter v. Deck*, 174 Wn. 2d 207, 274 P.3d 336 (2012)

[45] Virtually all of the Clinic's specific citations to the record, such as RP 2008, RP 2009, RP 2012, RP 2013, and RP 2109, are directed at closing arguments and not evidentiary rulings. The Clinic primarily takes issue with the closing *argument* of counsel.

Moreover, it is not disputable that prior to October 27, 2015, and not until *after* the close of the case and the jury began deliberations that the standard of care claims were actually dismissed.[46] During the trial, the standard of care claim was still legally a part of the ongoing trial. Until October 27, 2015, the Flyte family retained the right to pursue those claims.[47] As a professional courtesy, and to simplify the trial, on September 29, 2015, the undersigned counsel did inform the Clinic's counsel and the Court that the Flyte family would not ask the jury to be instructed on the standard of care or to decide negligence on the verdict form, voluntarily explaining:

From:	Lincoln Beauregard [lincolnb@connelly-law.com]
Sent:	Tuesday, September 29, 2015 5:21 PM
To:	'Brian Cahill'; Elizabeth A. Leedom
Cc:	Deborah K. Austin; Cheryl A. Phillips; Vickie Shirer; Elizabeth J. Curtis; Julie Kays; Ashton Dennis; Jennifer Cott; Jennifer G. Crisera
Subject:	RE: St. Joe's Fault

We are not presenting a claim upon the standard of care and/or challenging that they did, or did not, meet the standard of care. They didn't, but that's not what this trial is about, or ever was as my team learned from the first go round. We are just pursuing an informed consent claim, per our verdict form.

Lincoln

48

This was the Flyte family's voluntary disclosure. As a matter of law, the Flyte family's standard of care claims could not be (and were not) dismissed until *after* the close of trial. *See* CR 50(a)(1). Prior to the close

[46] CP 195-96

[47] *Id.*

[48] CP 450-55

of trial, the Clinic had no grounds to successfully have any standard of care claims, or even Abbigail's claims, dismissed or excluded from evidence. *Id.*

"*No good deed goes unpunished.*"[49] In this effort to obtain a new trial, the Clinic is seeking to penalize the Flyte family for forewarning the Clinic's lawyers that the standard of care claims would be dropped at the end of the case. The Clinic's associated arguments have no merit. In essence, the Clinic is arguing that undersigned counsel should be punished for voluntarily disclosing the trial strategy of intending not to present a full standard of care case. The undersigned counsel actually weighed whether or not to keep this intention a secret until the close of trial but decided to make the disclosure pre-trial in good faith for the benefit of all parties, and the Court. The Flyte family by no means did anything wrong, or should be penalized, for acting in good faith by advising the Clinic's lawyers prior to trial of this intention. Accepting the Clinic's arguments would encourage litigants not to afford opposing parties such basic courtesies. In effect, the Clinic's lawyers are accusing the undersigned counsel of "misconduct" for providing advance notice of the intention to drop the standard of care claims after the close of evidence. There is no law that supports the Clinic's argument in this regard.

[49] Quote By Oscar Wilde

Moreover, to be clear, Judge Culpepper overruled some objections and sustained others. At no point in time did the undersigned ever persist in a line of specific argument or evidentiary inquiry that contradicted any rulings. It is not inherently "misconduct" to have a trial court sustain an objection. Misconduct as illustrated in the case law requires a patterned deliberate intention to flout judicial rulings[50] – and upon this record there was none. The Clinic's claims in the opening brief that the undersigned committed "misconduct" or violated judicial rulings are fabricated liberties that are being taken from the true record. This case was litigated fairly and in accord with Judge Culpepper's evidentiary rulings.

Beyond that, all of the argument and evidence at issue was properly admissible under ER 401 to prove that reasons why and how the Clinic and Dr. Marsh proximately caused the death of Katie Flyte.[51] The specific evidence and argument to which the Clinic takes issue was all relevant to the informed consent claims, and the entire context of the case.

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[50] *Teter v. Deck*, 174 Wn. 2d 207, 274 P.3d 336 (2012)

[51] Proximate cause is an essential element of any tort theory; it consists of two elements: (1) factual or "but for" causation and (2) legal causation. *Baughn v. Honda Motor Corp.*, 107 Wash.2d at 142, 727 P.2d 655; *Hartley v. State*, 103 Wash.2d 768, 777, 698 P.2d 77 (1985). Factual causation is established between a defendant's act and a subsequent injury only where it can be said the injury would not have occurred "but for" the defendant's act. W. Keeton, D. Dobbs, R. Keeton, and D. Owen, *Torts* § 42, at 273 (5th ed. 1984). As noted in *Baughn*, 107 Wash.2d at 142, 727 P.2d 655: "Cause in fact refers to the ... physical connection between an act and an injury." The existence of factual causation is generally a question of fact for the jury. *Baughn*, at 142, 727 P.2d 655 (1986).

The Clinic contends it was improper to argue that "*this was not a facility that was doing what their responsibilities were to make sure people were safe.*"[52] This statement is true in that the Clinic was failing to inform pregnant women of the risks associated with H1N1 during a pandemic. *See* ER 401. The argument and evidence was also admissible to impeach the Clinic's contrary representations. *Id.* The Clinic contends it was improper to argue that "*If a facility is truly being diligent, they don't just lose critical health alerts.*"[53] This statement is true in relation Dr. Marsh's failure to convey any information about the health alerts to Mrs. Flyte that resulted in her untimely death. *See* ER 401. The Clinic contends that it was improper to argue that "*These particular systemic failures...had an overall lack of preparedness and a breakdown in the safety net...*" Again, these statements were all true and caused the Clinic, by and through Dr. Marsh, to fail to provide Mrs. Flyte with proper informed consent.[54] *See* ER 401. The information related to Mrs. Flyte's son, Jacob Flyte, suffering from flu symptoms was also highly relevant to the informed consent claim.[55] The fact that the "*[T]his is a clinic that is treating too many people too quickly and missing critical information*" was proven true

[52] Clinic's Opening Brief, Page 11; *see also* VRP 2008

[53] Clinic's Opening Brief, Page 11; *see also* VRP 2008

[54] Clinic's Opening Brief, Page 11; *see also* VRP 2008-9

[55] Clinic's Opening Brief, Page 11; *see also* VRP 2012

and caused Dr. Marsh to fail to provide Mrs. Flyte with proper informed consent. All of the argument and evidence was probative as to the informed consent claim in accord with ER 401. Judge Culpepper did not sustain a single evidentiary objection in this regard that was then later violated. None of the representations and/or evidence were inaccurate or unfairly prejudicial. Moreover, the Flyte family was entitled to impeach the Clinic's claims of diligence during the H1N1 pandemic. And Judge Culpepper most certainly did not abuse his own discretion when denying the motion for a new trial.

The Clinic also takes issue with the undersigned counsel's argument in rebuttal during closing arguments indicating that the Clinic was, in fact, negligent.[56] This particular assertion was in direct rebuttal to an extended closing argument by Elizabeth Leedom asserting and implying that the Flyte family did not believe that the Clinic was "negligent" in any way:

> MR. BEAUREGARD: Objection. We're having a whole slide show about what she said I couldn't talk about.

[56] The undersigned counsel never mentioned or used the word "negligent" or "negligence" during the opening statement or during the presentation of evidence. The portions of the Clinic's brief wherein it is claimed that the undersigned argued for "negligence" are the opposing lawyers' inferences as to the value of the evidence, not actual statements by counsel. For example, the Clinic artificially categorizes the failure to conduct proper staff meetings and/or the dissemination of health alerts as "negligence" wherein it is really just evidence related to the informed consent claim. The Clinic takes this dishonest liberty with the record at multiple occasions to try and create the false impression that the word "negligence" was utilized throughout the trial, which is untrue.

MS. LEEDOM: No, Your Honor. He brought this up.

THE COURT: Well, let me hear your brief response.

MS. LEEDOM: Thank you, Your Honor...There is – counsel made a big deal about, well, one of the reasons Dr. Marsh didn't get this informed consent about H1N1 is history of fever. There is no claim that Dr. Marsh or Andrea Brady should have got that history of fever or that they were negligent in any way. There is no claim. They had plenty of experts who were willing to come into court and criticize Dr. Marsh and criticize the Summit View Clinic. **Don't you think if there were claims of negligence, they would have been brought to you for consideration.**

MR. BEAUREGARD: Your Honor, objection. We are again –

THE COURT: It's sustained.

MS. LEEDOM: Your Honor –

THE COURT: Let's move on. I'm sustaining the objection.

MS. LEEDOM: Again, same as to Andrea Brady.

MR. BEAUREGARD: Same objection, Your Honor.

THE COURT: Same ruling. Let's avoid standard of care arguments. Standard of care is not at issue in this trial.[57]

In effect, Ms. Leedom argued the Clinic was *not* negligent, and had *not* committed negligence.[58]

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[57] VRP of November 26, 2015, Pages 11-14 of Defense Closing Argument.

[58] Ms. Leedom's argument about the absence of evidence of negligence went beyond the record, were therefore unethical, and not legally permissible. *See* 14A Wash. Prac., Civil Procedure § 30:26 (Closing argument—Scope and content) (2d ed.). Ms. Leedom

"*What's good for the goose is good for the gander.*"[59] In rebuttal, once the door was opened by Ms. Leedom,[60] undersigned responded specifically to the misleading representations about the purported absence of negligence:

> ...Ms. Leedom kept putting up slides, something about this is not a negligence case, and all of that. The Summit View Clinic was way negligent, way negligent in this case.
>
> MS. LEEDOM: Your Honor, object to that argument.
>
> MR. BEAUREGARD: They --
>
> MS. LEEDOM: Your Honor, I object to that argument. There is no evidence. It's not supported by the evidence and it's prejudicial. Mr. Beauregard's opinions are irrelevant.
>
> THE COURT: Let's stick to informed consent, Mr. Beauregard. That's the claim the jury is to evaluate.
>
> MR. BEAUREGARD: **This case has been compartmentalized legally into what's called informed consent. That's what you're deciding the case on. The fact that Summit View Clinic may or may not have been really negligent about other topics, that's not what you're here to decide.** It's: Did they provide informed consent. That's a true statement about this case, just to kind of clear that up. So if there's a representation that we don't think they were negligent, that's not right.[61]

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compounded this effort by later arguing that the fact that Katie Flyte's parents, the Brehans, did not testify meant that they didn't support the case.

[59] http://idioms.thefreedictionary.com/_/gr.aspx?url

[60] *See* 5 Wash. Prac., Evidence Law and Practice § 103.14 Waiver of objections—"Opening the door" (5th ed.).

[61] VRP of October 26, 2015, Pages 48 and 49 of Plaintiffs' Closing Argument.

The Flyte family, by and through the undersigned counsel, had every right to rebut Ms. Leedom's misleading assertions and doing so certainly does not warrant a new trial. *See Safeco Ins. Co. of America v. JMG Restaurants*, Inc., 37 Wash. App. 1, 680 P.2d 409 (Div. 1 1984). As a matter of law, the lawyer for the opposing party may respond to a lawyer's statement in final argument containing facts that are outside the record. *Id.* As illustrated:

> Appellant argues that the trial court allowed respondents' attorney to make improper closing argument by going beyond the evidence in explaining his own activities in connection with the matter. That argument was in direct response to statements outside the record which appellant's attorney had made in his closing argument relating to the same subject of activities by respondents' attorney. The court had ruled that appellant's attorney was making statements outside the record as to what time respondents' attorney became involved with certain matters. Appellant's attorney then said:
>
> Mr. Kirkland then was rather promptly thereafter, he was involved in this thing. He can say later if he wants.
>
> When it was respondent's turn to argue, the attorney commented on the same subject matter. He advised the judge that he was responding to what opposing counsel had said. The judge overruled the objection. That ruling was not error. Not only had appellant's attorney opened up this matter and argued it, but he had specifically said to the jury that opposing counsel could respond: "He can say later if he wants." It would have put opposing counsel at a definite disadvantage if he had not responded to that invitation.
>
> Counsel may not argue a question to the jury and claim error when his adversary does likewise. Such argument by the complaining party waives the error, if any.

Krieger v. McLaughlin, 50 Wash.2d 461, 463, 313 P.2d 361 (1957).

> The matter was not significant enough to require a reversal in any event. The judge and both lawyers told the jury that attorneys' argument was not evidence.

Id.

Moreover, the rule is that a new trial should not be granted because of misconduct of counsel, unless there has been a request to the trial judge to give the jury a corrective instruction, except where the misconduct was so flagrant that no instruction would cure it. *City of Seattle v. Harclaon*, 56 Wash.2d 596, 354 P.2d 928 (1960); *McUne v. Fuqua*, 42 Wash.2d 65, 253 P.2d 632 (1953); *State v. Leuch*, 198 Wash. 331, 88 P.2d 440 (1939). Here, the occurrences at issue were not misconduct, Ms. Leedom opened the door to a direct rebuttal to her "no claim of negligence" arguments, and Ms. Leedom failed to ask for a curative instruction. To be clear, the undersigned counsel did mention the word "negligent" and also advised the jury to solely decide the case upon informed consent: "***This case has been compartmentalized legally into what's called informed consent. That's what you're deciding the case on. The fact that Summit View Clinic may or may not have been really negligent about other topics, that's not what you're here to decide.***"[62] No curative instruction was requested, the Court also remarked the focus of this case was informed

[62] VRP of October 26, 2015, Pages 48 and 49 of Plaintiffs' Closing Argument.

consent, and there was no unfair prejudice.[63] For these reasons, Judge Culepper did not abuse his discretion when denying the Clinic's request for a new trial.

Finally, it is important to note that the Clinic's argument is wholly reliant up the premise that merely uttering word the "negligence" is prejudicial. Negligence is a legal term of art that is regularly utilized in courtrooms and even in pattern jury instructions. Failing to provide informed consent is a form of medical negligence. *See* RCW Chapter 7.70. The mere mention of the word "negligence" is not inherently prejudicial. In this instance, the word "negligence" was never used by the undersigned *except* in direct response to Ms. Leedom's assertions that there was none. In this regard, Judge Culpepper found that the "*phrase about 'they were way negligent,' however, was in rebuttal to Ms. Leedom in her closing saying that negligence isn't an issue, something like that, so he was rebutting that.*"[64]

An informed consent claim is a species of negligence under RCW 7.70 and the only reason why the Clinic has any basis to even make this

[63] *See e.g. Strandberg v. Northern Pacific R. Co.*, 59 Wash.2d 259, 367 P.2d 137 (1961) (Any prejudice resulting from comment by plaintiff's attorney, during his argument to jury, in action for personal injuries, to effect that defendant was unwilling to have jury informed as to standard safety practices, was cured by court's instruction to disregard statement; and though defendant might have been entitled to further instruction to effect that there had been established no standards of safety, defendant's failure to request such instruction was waiver of any possible further error.)

[64] VRP of December 1, 2015, Page 34

tenuous argument is that the undersigned voluntarily disclosed an inclination prior to trial not to ask the jury to deliberate on those claims. As to every piece of evidence and argument, the Clinic was provided a full and complete opportunity to respond. This trial was as fair as possible. Judicial discretion "means a sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable under the circumstances and the law, and which is directed by the reasoning conscience of the judge to a just result." *State ex rel. Clark v. Hogan,* 49 Wash.2d 457, 462, 303 P.2d 290 (1956). Judge Culpepper exercised sound discretion when reviewing and rejecting the Clinic's arguments. There is no legitimate basis to even consider granting a new trial. The jury's verdict should stand.

VII. THERE WAS NO JUROR MISCONDUCT OF ANY KIND; THE JUROR'S ACTUALLY DEMONSTRATED "GOOD CONDUCT"

Judge Culpepper did not err in denying the Clinic's request for a new trial the first time in relation to the purported juror misconduct as there was only jury "good conduct". The case law is supportive. For example, in a medical malpractice lawsuit, it was held the publication of article dealing with subject matter of trial but without any specific reference to case on trial, when article is read by some of jurors, is not on its face ground for new trial. *Barnes v. Central Wn. Deaconess Hospital,*

Inc., 5 Wash .App. 13, 485 P.2d 85 (1971). It has been held that it is not an abuse of discretion for trial court to deny motion for new trial on grounds of jury misconduct, where alleged misconduct consisted of "talk about insurance" during deliberations, and where affidavits in support of motion showed talk was without effect on verdict. *Kellerher v. Porter*, 29 Wash.2d 650, 189 P.2d 223 (1948). As an example, there is not even juror misconduct if they choose to do their own experimentation. In order to have verdict set aside on ground of jury misconduct in that experiment was conducted during jury's deliberations, it must be shown that the experiment resulted in prejudice to the complaining party, that is, that jurors obtained new evidence not introduced at trial, and that such evidence influenced verdict. *Tarabochia v. Johnson Line, Inc.*, 73 Wash. 2d 751, 440 P.2d 187 (1968). In this case, Jurors 4 and 8 called the flyer at issue to the attention of the Court. During the arguments for the new trial, Judge Culpepper observed:

> *...Jurors 4 and 8, one of them -- and I forget which -- saw it and said "this is strange" or something like that to the other, and my understanding is that's about all they did. They did notice a few of the bolded things. Nothing that was on this chart that they testified to seeing was something that they wouldn't have heard and didn't hear a number of times during the trial. So I have difficulty calling this misconduct, which implies some kind of wrongdoing...*[65]

[65] VRP of December 1, 2015, Page 32

Neither juror was familiar with the content of the flyer.[66] Both jurors asserted it would not impact their abilities to weigh the evidence fairly.[67] Jurors are presumed to follow instructions to disregard improper evidence. *See Nichols v. Lackie,* 58 Wash. App. 904, 907, 795 P.2d 722 (1990). Judge Culpepper properly instructed the jurors only to consider the evidence at trial and both jurors indicated a willingness and ability to do so. Moreover, the Clinic has failed to articulate in what way that the flyer at issue was misleading and/or substantively prejudicial.

In moving for a new trial, the Clinic relies heavily upon *State v. Rinkes*, 70 Wn. 2d 854, 425 P.2d 658 (1967). *Rinkes* is not analogous. In *Rinkes* a highly prejudicial newspaper article was published on the day of deliberations and it was held, in that criminal case on those particular facts, that the criminal defendant could not have received a fair trial. *Id.* Notably, the actual prejudicial article was introduced into the jury which material was clearly intended to influence readers of it to be concerned about purported leniency of area judges to alleged criminals. *Id.* The circumstances of this case are in no way analogous. *Rinkes* certainly does not mandate reversal.

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[66] VRP of December 1, 2015, Page 33

[67] VRP of December 1, 2015, Page 33

The Clinic also baldly contends that Judge Culpepper did not apply the correct legal standard stated as being that "[i]f the trial court has any doubt about whether the misconduct affected the verdict, it is obliged to grant a new trial." *Adkins v. Aluminum Co. of America*, 110 Wash. 2d 128, 137, 750 P.2d 1257 (1988). Applying this standard, Judge Culpepper determined, objectively based upon the circumstances, and subjectively based upon the inquiry of Jurors 4 and 8, that there was no prejudice and/or juror misconduct.[68] Furthermore, Judge Culpepper did not apply the wrong legal standard simply because he took the Jurors' remarks under consideration. Judge Culpepper found:

> *...There's no indication they discussed it. They didn't withhold anything from it. In fact, they're the ones who brought it to Angie's attention, and we brought them out here to talk to them about it and told them not to discuss it further. I have no reason to think they did discuss it further. And there's no indication that what little they saw in this made any real difference. Everything on the chart, they would have heard something during the trial. So I can't say there's any grounds for a new trial based on misconduct...*[69]

It should be noted that the poster at issue was not prominently displayed. In reality, it was squirreled away behind a Jenga game within a bookcase, as depicted below:

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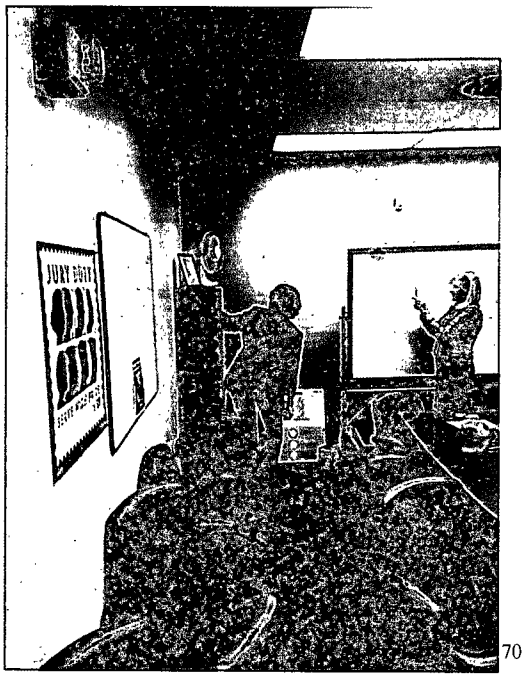
[68] VRP of December 1, 2015, Page 32

[69] VRP of December 1, 2015, Page 33

 [70]

Moreover, even if Judge Culepper had applied the incorrect legal standard, the proper remedy would not be granting a new trial. A trial court's discretionary decision "is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Rohrich,* 149 Wash.2d 647, 654, 71 P.3d 638 (2003). A court's exercise of discretion is "'manifestly unreasonable'" only if "the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'" *Id.* (quoting *State v. Lewis,* 115 Wash.2d 294, 298–

[70] CP 157-59. This is an image of the Court's judicial assistant pointing to the location of the posting with Ms. Leedom taking a photo and attorney Ashton Dennis taking a photo of Ms. Leedom doing so. *Id.*

99, 797 P.2d 1141 (1990)). Judge Culpepper's observations and findings were completely reasonable based upon this record. On these facts, Judge Culpepper did not abuse his discretion. A new trial is not warranted. The Clinic's motion for a new trial was appropriately denied the first two times, and should be denied again.

VIII. THE VERDICT WAS NOT BASED UPON OR IN REACTION TO IMPROPER PUNITIVE DAMAGES ARGUMENTS

Court proceedings, including civil trials, are about accountability and placing responsibility:

> accountability
>
> [*uh*-koun-t*uh*-bil-i-tee]
>
> Spell Syllables
>
> Noun
>
> the state of being accountable, liable, or answerable.[71]

This case involved the untimely death of Katie Flyte, while pregnant with Abbigail Flyte, and a set of tragic associated circumstances. The Clinic cites no authority supporting the conclusion that the usage of the word "accountability" is improper. The undersigned never offered any impermissible "send a message" type of arguments and just asked for justice, including for only "$1" as to Kenny Flyte's claim:

[71] http://dictionary.reference.com/browse/accountability

> MR. BEAUREGARD: So Kenny Flyte, I submit to you for the loss of his wife, and all of the loss he experienced, the range that would be appropriate is also 1 to 5 million. But Kenny has given me an instruction, and I'm bound by it because he's my client, he's told me to recommend that the jury award him a dollar. Because he doesn't care about the money; he cares about **accountability**. He cares about proving the point that the Summit View Clinic is **responsible**.
>
> MS. LEEDOM: Your Honor, objection. Objection this is an argument for exemplary damages. It's not an appropriate argument.
>
> MR. BEAUREGARD: I'm asking for a dollar.
>
> MS. LEEDOM: Your Honor, Kenny Flyte's motivation not only is there no evidence of this, but it's improper evidence
>
> MR. BEAUREGARD: I'm asking for a dollar.
>
> THE COURT: Overruled.
>
> MR. BEAUREGARD: Kenny Flyte told me to ask you for a dollar. What he cares about is **accountability**. What I would submit to you is it would be appropriate to make an award between 1 and 5 million, but what Kenny cares about is that dollar. You can deliberate and make your own decision because no matter what Kenny Flyte recommends, no matter what I recommend, the decision is ultimately yours...[72]

It should be noted that the request for "$1" was authentic, and the undersigned was following the express instructions of Mr. Flyte. During the arguments on the motion for a new trial, the undersigned explained:

> ...There has been an argument that we asked for exemplary damages, Your Honor, and I want to make a record that I couldn't be more proud of my client in this case because not

[72] VRP of October 26, 2015, Pages 44-45 of Plaintiffs' Closing Argument

> once coming up to the point where we did closing arguments until the lunchtime before did Kenny Flyte even ask about or even care about the money. And I told Mr. Flyte, I told him clear as day at lunchtime, I said, Mr. Flyte, Kenny, I'm going to go make a closing argument and I know all you want is to make sure that the clinic is held accountable, a synonym for responsibility, and I said, Kenny, the less money that we ask for, the more likely you are to get accountability.[73] I said we could ask for as little as a million; we could ask for as much as $10 million.
>
> And before I said the word "million," I actually wrote a "one" onto my piece of paper, Your Honor. I wrote one to five, and he didn't know I was going to say a million. I was a little nervous having this talk with my client because I thought he was going to be upset we were going to recommend too little money, and before I could finish speaking, Your Honor, he looked at me and said, "Ask for the dollar." And I said, well -- I was going to say to him it could maybe be a million. He said, "Ask for a dollar."
>
> Everything we said in that closing argument about what the Flyte family was looking for was 100 percent authentic and 100 percent true and completely in accord with rules and completely in accord with this Court's pretrial rulings. There is no precedent in the state of Washington, and there never will be, that using the word "accountability" for a man that's lost his wife and his daughter is the equivalent of asking for punitive damages...[74]

Under Const. Art. I § 21 and RCWA § 4.76.030, there is strong presumption that a verdict is adequate, and court cannot, after fair trial, substitute its conclusions for that of jury on conflicting evidence as to amount of damage; jury is final arbiter of evidence, being limited only in

[73] By intending the ask for a lesser amount of money, the undersigned was just hoping for a win of any kind and not even concerned with achieving the resultant record judgment.
[74] VRP of December 1, 2015, Page 20-21

that its verdict must be supported by substantial evidence.[75] *A.C. ex rel. Cooper v. Bellingham School Dist.*, 125 Wash. App. 511, 105 P.3d 400, 195 Ed. Law Rep. 327 (Div. 1 2004) (School district's urging jury during closing argument, in negligence action against district by first grade student who was injured at birthday party when teacher lost grip on piñata bat, to think about "the value of a dollar ... what it means to you" was not improper "golden rule argument"; district was not appealing to the jurors to put themselves in its position and then decide whether they would want to be found guilty of negligence, but rather telling the jurors to determine what amount of money would compensate the student and what that money meant to them.) Juries have considerable latitude in assessing damages, and a jury verdict will not be lightly overturned. *Palmer v. Jensen,* 132 Wash.2d 193, 197, 937 P.2d 597 (1997); *Cox v. Charles Wright Academy, Inc.*, 70 Wash.2d 173, 176, 422 P.2d 515 (1967) (the law strongly presumes the adequacy of the verdict). Appellate courts evaluate whether substantial evidence supports the jury's verdict, viewing the evidence in the light most favorable to the nonmoving party. *Bunch v. King County Dep't of Youth Servs.*, 155 Wash.2d 165, 178, 116 P.3d 381 (2005); *Gestson v. Scott,* 116 Wash. App. 616, 622, 67 P.3d 496 (2003). "'If there is any justifiable evidence upon which reasonable minds might

[75] *Cox v. Charles Wright Academy, Inc.*, 70 Wash.2d 173, 422 P.2d 515 (1967).

reach conclusions that sustain the verdict, the question is for the jury.'" *Lockwood v. AC & S, Inc.*, 109 Wash.2d 235, 243, 744 P.2d 605 (1987) (quoting *Levy v. N. Am. Co. for Life & Health Ins.*, 90 Wash.2d 846, 851, 586 P.2d 845 (1978)). A trial court has no discretion to disturb a verdict within the range of evidence. *Bunch,* 155 Wash.2d at 177–78, 116 P.3d 381 (quoting *Hendrickson v. Konopaski,* 14 Wash. App. 390, 394–95, 541 P.2d 1001 (1975)). Further, inconsistencies in evidence are matters which affect weight and credibility and are within the exclusive province of the jury. *Dupea v. City of Seattle,* 20 Wash.2d 285, 290, 147 P.2d 272 (1944); *McUne v. Fuqua,* 45 Wash.2d 650, 653, 277 P.2d 324 (1954). The jury entered an award that was consistent with the evidence and most certainly was not excessive.

Where the proponent of a new trial argues the verdict was not based on the evidence, a court looks to the record to determine whether sufficient evidence, viewed in the light most favorable to the non-moving party, supports the verdict. *Fahndrich v. Williams*, 147 Wash. App. 302, 194 P.3d 1005 (2008), review withdrawn 208 P.3d 1123. The Supreme Court created a cause of action for loss of parental consortium in *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984). The court defined parental consortium as the "loss of a parent's love, care, companionship, and guidance...." 103 Wn.2d at 132, n. 1. Subsequent

cases from the Court of Appeals have involved parental consortium instructions that used slightly different terminology, but in none of these cases did the appellate court rule on the appropriate phrasing of the instruction. *See Ebsary v. Pioneer Human Services*, 59 Wn. App. 218, 796 P.2d 769 (1990) ("love, affection, care, companionship, protection, guidance, and moral and intellectual training and instruction"); *Cornejo v. State*, 57 Wn. App. 314, 788 P.2d 554 (1990) ("support, love, care, guidance, training, instruction and protection"). Judge Culpepper's Jury Instruction No. 15 provided: "If you find for the plaintiff you should consider the following items: what Kathryn Flyte reasonably would have been expected to contribute to Jacob Flyte in the way of love, care, companionship, and guidance."[76] In relation to Jacob Flyte, that young man will grow up never knowing his loving and protective mother:

> Q. Can you tell us what kind of mother Katie was to Jacob?
>
> A. She was incredible. She spent so much time with him during the day, obviously, being the only caretaker, that I missed so much of the small things, you know, the laughs, the jokes, the buddy-buddy they had, and she did a very good job with him. Before he could even speak, he was using sign language to tell us if he had to eat or was hungry or needed something. She stayed on top of it; you know

[76] CP 197-216

what I'm saying, and not letting him get hurt or anything. Just very protective.[77]

The jury decided the appropriate award was $6.7 million -- which is not nearly high enough to compensate for such as loss.[78] The verdict should have been $10 million (or more).

Pain and suffering damages are available if "measurable time" elapses between injury and death. *Chapple v. Ganger*, 851 F. Supp. 1481, 1486 (E.D.Wa.1994) (citing *Bingaman v. Grays Harbor Community Hospital*, 103 Wn.2d 831, 837, 699 P.2d 1230 (1985)); *Tait v. Wahl*, 97 Wn. App. 765, 770–71, 987 P.2d 127 (1999). The Court's Jury Instruction No. 13 provided: "You should consider the following items: the pain, suffering, anxiety, emotional distress, humiliation, and fear experienced by Kathryn Flyte prior to her death..."[79] For Kathryn Flyte, there was Kenneth Flyte's testimony about her pre-death and suffering and the testimony: "*Once they told me that they had to get this thing, I heard my -- **I heard my wife for the last time scream** and I could hear somebody in*

[77] VRP of October 12, 2015, Page 10: Testimony of Kenny Flyte

[78] Summit View's Attorney's conceded the tragic nature of this case: ("No one is going to tell you that this isn't a sad or tragic case" Closing Argument at 5:8:9)("The other thing I'm not telling you to do, and wouldn't tell you to do, I told you in jury selection I wouldn't do this, I'm not asking you to value Katie Flyte's life. Nobody can value a life. A beautiful young woman, a tragic heartbreaking death. No question about it; no question about it." Closing Argument 57:5-10)("Mr. Flyte lost his wife, whom he loved." Closing Argument 59:13) ("It was a tragic death. If anyone thinks or intimates that in any way we don't think that this is a tragic death is just wrong." Opening Statement 3:23-35 – 4:1-2.)

[79] CP 197-216

there fighting, and then all of a sudden there was calm; there was nothing, and then people started to leave the room. And then the curtain opened and my wife was passed out, and the CPAP was gone and there was a tube down her throat with tape all over her mouth keeping the tube down."[80] Screaming evidences conscious pain and suffering.[81] Additionally, Dr. Riedo testified she would have suffered less if given Tamiflu.[82] The verdict for Katie Flyte should have been $10 million (or more) as well.[83]

In relation to the pre-death pain and suffering evidence, this case is much like *Bingaman v. Gray's Harbor Community Hospital* wherein the Supreme Court observed:

> Here the decedent's death was caused by the defendant's medical malpractice. Since the decedent left a surviving spouse and children, the personal representative suing under the tort survival statute, RCW 4.20.060, was entitled to recover damages for the decedent's pain and suffering caused by the malpractice. The jury was thus correctly instructed that its verdict could properly include damages for pain and suffering, "both mental and physical" experienced until the time of her death. The jury was also entitled to consider in that connection the decedent's fear

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[80] VRP of October 12, 2015, Pages 23-23:Trial Transcript of Kenneth Flyte

[81] In the briefing leading up to the underlying motion for a new trial, Ms. Crisera and Ms. Leedom claimed that this evidence did not exist.

[82] VRP of October 15, 2015, Pages 74-80: Trial Transcript of Frances Riedo

[83] It should not be forgotten that the Flyte family voluntarily passed upon asking for millions of dollars in medical bills and other economic losses. The Flyte family waived all of the extraneous claims in the hope of just winning something, anything during trial. After losing the first trial, the Flyte family, and their lawyers, decided to present this and every case as purist to the key issues, as was done in this case. Huge economic loss damages are not worth anything if you do not win the trial.

> that she was dying, and in view of the graphic and uncontested evidence presented in that regard, doubtless did consider it.
>
> Although the decedent was unconscious during some part of her last 35 hours of life, due to her condition or sedation or both, substantial evidence was presented from which the jury could find that during much of that period of time she not only suffered extreme conscious pain, fear and despair at not being helped, but also had the conscious realization her life and everything fine that it encompassed was prematurely ending. The verdict of a jury does not carry its own death warrant solely by reason of its size. It is admittedly difficult to assess in monetary terms the damages for such pain and suffering, but although the damages for the decedent's pain and suffering awarded by the jury were very substantial, that award does not under the facts and circumstances established by the evidence shock our sense of justice and sound judgment.

Id. at 836. The evidence of record more than supports the verdict – the evidence justifies it. Ironically, even though the Flyte family did not present a pull the heart strings trial, and the Clinic argues that the evidence of damages is thin, the Clinic's lawyers still managed to argue in the same brief that the verdict was the result of passion and prejudice on the part of the jury. This could not be less true.[84]

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[84] The appellate opinions are clear: a multi-million dollar verdict, in and of itself, is insufficient to "shock the conscience" or establish passion or prejudice. *See Joyce v. State, Dep't of Corr.*, 116 Wn. App. 569, 603, 75 P.3d 548 (2003) *aff'd in part, rev'd in part*, 155 Wn.2d 306 (2005) ($22 million verdict in wrongful death case, including $21 million in general damages, did not "shock the conscience"); *Winchester v. Stein*, 86 Wn. App. 458, 464, 937 P.2d 618 (1997) *aff'd in part, rev'd in part*, 135 Wn.2d 835 (1998) ($12 million damage award in wrongful death case was not excessive); *Washburn v. Beatt Equipment Company*, 120 Wn.2d 246, 265-81, 840 P.2d 860 (1992) ($8,000,000 verdict in favor of 50-year-old electrician who sustained third-degree burns was not excessive); *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 34, 864

Absent passion or prejudice, the amount of damages must be so excessive as to be outside the range of evidence or so great as to shock the court's conscience in order to require a new trial; there must be no reasonable evidence or inference to justify the award. *Conrad ex rel. Conrad v. Alderwood Manor*, 119 Wash. App. 275, 78 P.3d 177 (2003). "Before passion or prejudice can justify reduction of a jury verdict, it must be of such manifest clarity as to make it unmistakable." *Washburn*, 120 Wn.2d at 269. "The issue thus becomes whether the size of the award for pain and suffering in and of itself 'shocks the conscience of the court.'" *Id.* "Stated otherwise, were the damages flagrantly outrageous and extravagant?" *Id.* A trial court has no discretion to disturb a verdict within the range of evidence. *Bunch,* 155 Wash.2d at 177–78, 116 P.3d 381 (quoting *Hendrickson v. Konopaski,* 14 Wash. App. 390, 394–95, 541 P.2d 1001 (1975)). In this instance, the Clinic has failed to identify what evidence and/or argument improperly fueled this "passion or prejudice" other than the facts of the case. The undersigned counsel did not make an emotionally filled argument. The jury was not asked to "send a message" to the community or other defendants as a deterrent for this type of abhorrent health care. Other than evidence of fault that was properly

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P.2d 921 (1993) (jury verdict, returned in 1992, that included $5.8 million in general damages did not shock the conscience).

admitted, the jury was not influenced by anything other than the facts of the case.[85] And this is a tragic case. Kathryn Flyte did not have to die. The Clinic could have prevented her death – and the suffering of the entire Flyte family. Kenneth Flyte had to do the unthinkable – decide to end the lives of his wife and baby girl. The undersigned counsel recommended damages awards and the jury believed that those amounts might have even been too low. On these facts, the Clinic is fortunate that the verdict was not $100 million. The amount of the verdict should not be disturbed any further.

Additionally, Abbigail Flyte did not live a full life as a result of the failures of the Clinic. To simplify the trial, the Flyte family did not ask that Abbigail's claim appear on the verdict form. However, a very real part of the Flyte family's damages involved Kenny Flyte coping with the loss of young Abbigail without the love and support of Katie Flyte – a form of loss of consortium. This Court's Jury Instruction No. 14 provided for damages of: "what Kathryn Flyte would have contributed to Kenneth Flyte in the way of marital consortium."[86] The evidence was presented was in accord with Kenny Flyte's claim. Kenny had to deal with

[85] The jury likely was very displeased that Dr. Marsh could not even recall Katie Flyte's age. The fact that Dr. Marsh was so clearly lacking in care or compassion for the Flyte family does not justify a new trial. In fact, Dr. Marsh's blunder further justifies the verdict. *See* VRP of October 20, 2015, Pages 1475-1527.

[86] CP 197-216

Abbigail's tragic circumstances without the aid and assistance of his wife, and Abbigail's mother. A passing mention that Abbigail Flyte "*deserved to live*" especially when the Clinic *did* cause her premature demise does not justify a new trial. Baby Abbigail *did* deserve life. The verdict is soundly based upon the evidence. Judge Culepper presided over the entire trial, and agreed. If this matter were remanded for a re-trial, it is just as likely that the next verdict is higher than the last.

Additionally, attorney Howard Goodfriend's argument regarding an excessive verdict is wholly without merit given his recent arguments before Division 1. In *Wuth ex. Rel. Kessler v. Laboratory Corp. of America*, Mr. Goodfriend (counsel for the Clinic) argued and convinced the Court that a $25 million dollar general damages award for a wrongful life claim was well warranted. *Wuth ex. rel. Kessler v. Laboratory Corp. of America*, 189 Wash. App. 660, 359 P.3d 841 (2015) *review denied.* In *Wuth*, parents of Oliver Wuth brought a wrongful life claim against Laboratory Corp. and other entities for failure to diagnose a birth defect in utero which would have prompted them to terminate the pregnancy. *Id.* The birth defect went negligently undetected and Oliver was born with defects which would require a lifetime of care. *Id.* Further, the parents of Oliver were awarded $25 million in general damages for the distress of raising a child with such a birth defect. The Court agreed with

Summit View's counsel that $25 million in general damages was not, "so excessive as to be 'flagrantly outrageous and extravagant,' particularly in light of the strong presumption we accord to jury verdicts." *Bunch*, 155 Wash.2d 165, 182, 116 P.3d 381. The result in this case should be no different.

IX. CONCLUSION

The Clinic's own reckless decision not to even engage in settlement negotiations and/or to offer as much as one-penny to settle the Flyte family's claims led to this just result.[87] Judge Culpepper did not abuse his discretion denying the Clinic's motion for a new trial. The Clinic's brief is an attempt to re-litigate the entire case as an end run around the applicable standard of review – abuse of discretion. Instead, the appellate brief reads like a report to Physicians Insurance why it is supposedly not the Clinic's lawyers' fault that they lost the trial so badly.[88]

In relation to the "offset" issue, the doctrine of invited error "prohibits a party from setting up an error at trial and then complaining of

[87] At the hearing on the motion for a new trial that occurred on December 2, 2015, the Clinic's insurer, Physicians Insurance, confirmed that it will indemnify the entire $16.7 million judgment. The adjuster assigned to the file refused to ever engage in settlement negotiations despite pleas from the Flyte family. The correspondence that was sent to the Flyte family from Physicians Insurance bordered on the disrespectful, and was certainly dismissive.

[88] The Flyte family demanded the policy limits on multiple occasions including immediately preceding the verdict. Physicians Insurance was dismissive in response.

it on appeal." *In re Call*, 144 Wash. 2d 315, 28 P.3d 709 (2001). In this regard, the recalculation and entry of judgment for the full amount is appropriate as occurred in *Washburn* and *Waite*. There was/is no "offset" available to the Clinic in this context. The Clinic's lawyers fabricated the associated legal premise and misled the trial Court when doing so. Moreover, despite being reminded of the need to actually submit the St. Joe's settlement agreement within the record for this Court to review, Ms. Leedom and Ms. Crisera failed to do so. The controlling principles are set forth in *Washburn*, *Adcox*, *Kottler*, and *Waite*. A judgment in full for $16.7 million should be entered against the Summit View Clinic on remand. The Flyte family also contends that the Clinic's lawyers should be sanctioned in accord with CR 11 for knowingly offering these legal misrepresentations that are not consistent with their own law firm's desk-book.

DATED this 13th day of May, 2016.

Respectfully submitted

Lincoln Beauregard

Lincoln C. Beauregard, WSBA No. 32878
Julie A. Kays, WSBA No. 30385
Connelly Law Offices, PLLC
2301 North 30th Street
Tacoma, WA 98403
(253) 593-5100

Attorney for Appellants

Ashton K. Dennis, WSBA No. 44015
Washington Law Center
15 Oregon Avenue, Suite 210
Tacoma, Washington 98409
(253) 476-2653
Attorney for Appellants

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

KENNETH FLYTE, P.R., *et al.*

Appellants,

v.

SUMMIT VIEW CLINIC, a Washington Corporation,

Respondent.

No. 48278-9-II

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the state of Washington, that she is now, and at all times materials hereto, a citizen of the United States, a resident of the state of Washington, over the age of 18 years, not a party to, nor interested in the above entitled action, and competent to be a witness herein.

I caused to be served this date the following:

- Respondent & Cross-Appellant's Opening Brief

I caused to be served this date the foregoing in the manner indicated to the parties listed below:

Elizabeth Ann Leedom
Jennifer M. Gannon Crisera
Bennett Bigelow & Leedom P.S.
601 Union St. Ste. 1500
Seattle WA 98101-1363
Attorney for Defendant Summit View Clinic

☐ Hand Delivered
☐ Facsimile
☐ U.S. Mail
☒ Email

CONNELLY LAW OFFICES, PLLC
2301 North 30th Street
Tacoma, WA 98403
(253) 593-5100 Phone - (253) 593-0380 Fax

Howard Mark Goodfriend
Smith Goodfriend PS
1619 8th Ave. N
Seattle WA 98109-3007
Attorney for Defendant Summit View Clinic

☐ Hand Delivered
☐ Facsimile
☐ U.S. Mail
☒ Email

DATED this 13th day of May, 2016.

Vickie Shirer

Vickie Shirer
Paralegal to Lincoln C. Beauregard

CONNELLY LAW OFFICES, PLLC
2301 North 30th Street
Tacoma, WA 98403
(253) 593-5100 Phone - (253) 593-0380 Fax